# In the United States Court of Appeals for the Ninth Circuit

Case No. 21183

SOUTHWESTERN CABLE CO., PETITIONER

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS, JACK O. GROSS, ET AL., INTERVENORS

Case No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS, JACK O. GROSS, ET AL., INTERVENORS

*ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION*

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## BRIEF FOR RESPONDENTS

### JURISDICTIONAL STATEMENT

The petitions for review were filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and the Judicial Review

Act of 1950, 5 U.S.C. § 1031, *et seq.* Petitioners seek review of a Memorandum Opinion and Order of the Federal Communications Commission released July 25, 1966 (R. 577–598) which designated for evidentiary hearing the question of the effect of petitioners' community antenna television operations in the San Diego area upon the public interest, insofar as petitioners bring Los Angeles television signals into San Diego, and which directed petitioners to limit the expansion of their systems pending that hearing.

## COUNTERSTATEMENT OF FACTS

Because petitioners' statements of the case are argumentative and incomplete, the following counterstatement is submitted to assist the Court.

### 1. *Background*

Originally, community antenna television systems (commonly called CATV [1] systems) came into being to bring television to areas not reached by any television station because of remoteness or terrain, and to afford multiple services to areas not already having

[1] The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Section 74.1101(a), 31 F.R. at 4570, 2 F.C.C. 2d at 801.

them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. Where such conditions prevail, an elaborate master antenna may be erected at a suitable location, usually on a mountain or other high elevation, where the reception of the signals of the desired stations is strong, and the signal may be amplified and brought to the community by cable or radio hops, and then distributed by cable to the homes of individual customers within the community.[2] At the home, the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,600. The distances which signals are taken has also greatly increased, to as much as 600 miles. (See Second Report and Order of the Commission, pars. 116, 117, 31 F.R. at 4557–8, 2 F.C.C. 2d at 771–2.) [3]

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[2] The distribution cable facilities may be supported on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the municipal government, as are franchises to engage in the business.

[3] The Second Report and Order in Docket Nos. 14895, 15233 and 15971, *et al.*, is the Commission opinion released March 8, 1966 adopting the rules governing CATV operation. It is attached hereto as Appendix B.

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities. (Second Report and Order, par. 117, 31 F.R. at 4558, 2 F.C.C. 2d at 771–2.) Because of this growth, the Commission for some time has been greatly concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities,[4] might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV carrying distant signals can cause.

The Commission first asserted jurisdiction over CATV systems using microwave radio to bring signals from the antenna, requiring such systems to carry local television stations and to avoid duplication of their programs within specified time periods. (See First Report and Order, 38 F.C.C. 683, 30 F.R. 6038.) The purpose of these rules was to avoid unreasonable competitive disadvantage and prejudicial effect upon television broadcast service.

On April 23, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 F.R. 6078, 1 F.C.C. 2d 453 (Appendix A hereto), proposing to assert jurisdiction

[4] It is not economically feasible to extend CATV service to sparsely populated outlying areas.

over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up, and to regulate the entry of CATVs carrying "outside," or distant signals into the major markets. Parties who were urging the adoption of rules to govern CATV pointed to the explosive growth of CATV operations and contended that unregulated CATV growth would, by fragmenting the available audience, endanger both local television service and the development of a nationwide "free" television service utilizing both VHF and UHF channels to provide multiple services in the larger communities with sufficient audience potential to support multiple stations.[5]

The Commission divided the proceeding into two parts. In Part I the Commission announced its tentative conclusion that it has jurisdiction over all CATV systems, whether or not they use radio to carry signals from the receiving antenna, and it proposed to extend the substantive provisions of the rules it had already adopted for microwave-served CATVs to all CATV systems (30 F.R. at 6082–3, 1 F.C.C. 2d at 463–467).

In Part II (30 F.R. at 6083–7, 1 F.C.C. 2d at 467–477), the Commission initiated a rule making inquiry

[5] By Public Law No. 529, approved July 10, 1962, 76 Stat. 150, 47 U.S.C. § 303(s), Congress, in the so-called all-channel receiver legislation, had authorized the Commission to require all television receivers shipped in interstate commerce, or imported into the United States, to be capable of receiving UHF as well as VHF signals. The major purpose of this legislation was to promote the development of multiple television services nationwide through locally situated UHF outlets. See H. Rept. No. 1559, 87th Cong., 2d Sess., 2–6; S. Rept. No. 1526, 87th Cong., 2d Sess., 2–5.

looking toward possible rule making on the further questions posed by the recent trends in CATV development, including, *inter alia,* the effect upon independent UHF stations of "the mushrooming entry of CATV into major centers of population * * *." 30 F.R. at 6083, 1 F.C.C. 2d at 468. The Commission stated that it needed further information on the probable impact of CATV in the larger population centers before reaching a decision (30 F.R. at 6084–5, 1 F.C.C. 2d at 470–471). It stated (par. 48, 30 F.R. at 6085, 1 F.C.C. 2d at 471):

> Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.[6]

[6] These proposals, described in the Notice, 30 F.R. at 6078–6082, 1 F.C.C. 2d at 453–463, included an American Broadcasting Company request that the Commission, "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to

The Commission announced that in the meantime it would grant microwave radio applications to bring CATV into large market areas only on a showing that independent UHF operations would not be threatened (30 F.R. at 6085, 1 F.C.C. 2d at 471). The Commission further requested early comments on an interim policy to be adopted where microwave facilities were not used by the CATV system (30 F.R. at 6085, 1 F.C.C. 2d at 472).

The Commission concluded (pars. 64, 65, 30 F.R. at 6086–6087, 1 F.C.C. 2d at 476–477) by advising all parties that although a further notice would in all likelihood be issued, final rules might be adopted "without conducting new proceedings." It stated:

> 64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV

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serve other areas except upon prior consent of the Commission," 30 F.R. at 6079, 1 F.C.C. 2d at 457; and a Westinghouse Broadcasting Co. request that, "CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station." 30 F.R. 6080–6081, [1] F.C.C. 2d at 460.

and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information we do not have a sound basis for specific rule proposals. *However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above.* Counter proposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission. [Emphasis added.]

65. The inquiry and proposed rulemaking are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. *Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. More-*

> *over, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not.* All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time." [Emphasis added.]

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, *et al.,* in which it adopted new final rules.[7] (31 F.R. 4540, 2 F.C.C. 2d 725.) (Appendix B hereto.) Upon a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission asserted jurisdiction over all CATVs, made final revised rules requiring the carriage of local television stations and non-duplication of their signals, adopted a new rule providing for hearing procedures to explore the impact of CATV operations in the major markets, and announced that there were certain areas of concern which would be dealt with on an *ad hoc* basis.

The Commission noted that Congress, in the 1962 all-channel receiver legislation, had made the judgment that the widest possible development of UHF is

[7] On February 15, 1966, the Commission had released a Public Notice in which it announced that new rules would shortly be adopted, to apply to non-microwave-served CATV systems, as well as those using microwave and announcing that February 15th would be the "grandfathering" date.

the best way of achieving an adequate national television service, comprised of a large number of local stations, including both commercial and educational stations, 31 F.R. at 4557, 2 F.C.C. 2d at 770. It believed that since UHF development was already proceeding in at least 163 communities or areas—most of which were located within the top 100 television markets—any halt or curtailment of the growth of UHF development caused by the distribution of signals from other areas in these communities by CATV would be particularly significant. The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the original station into the Grade A service area of any station in a community in one of the largest one hundred television markets.[6] It stated (par. 121, 31 F.R. at 4558–59, 2 F.C.C. 2d at 773), "The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets", and concluded (par. 126, 31 F.R. at 4560, 2 F.C.C. 2d at 776):

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[6] A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 percent of the locations. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 215–216 n. 12, 225 F. 2d 511, 515–516 n. 12 (1955).

> To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and most effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

Section 74.1107 of the Rules was adopted to effectuate this determination. (See Appendix C hereto for the text of the pertinent rules.) Subsection (d) of that rule provides that the general prohibition does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966. However, this "grandfather" clause is subject to the proviso that such a CATV system

shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station in the area, that such extension of service is contrary to the public interest. The proviso in subsection (d) ends by stating:

> The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

The purpose of this provision for relief against the expansion of existing systems was the Commission's belief that an existing CATV system "should [not] be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing)." (31 F.R. at 4563, 2 F.C.C. 2d at 785).

Section 74.1109 contains the procedures applicable to the petitions provided for in Section 74.1107, and further provides for petitions to waive the rules or "to impose additional or different requirements." Section 74.1109 further provides procedures for the grant of temporary relief pending a hearing on a petition.

Although the rule concerning CATV entry into the major markets related only to the extension of a signal beyond the Grade B contour of the originating station, the Commission also directed itself in the

Second Report and Order to the situation where two major markets are so located that the Grade B contour of a station in one already penetrates the other. The Commission recognized that the same problems may exist in such a situation as in the case where there is no such penetration, and it decided to deal with such situations on an *ad hoc basis*. It stated (Second Report and Order, 31 F.R. at 4564 n. 69, 2 F.C.C. 2d at 786 n. 69):

> If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

#### 2. *This proceeding*

The San Diego, California, area is the 54th largest television market in the United States. CATV franchises in the San Diego area are held by the petitioners, Mission Cable TV, Inc. (Mission), Pacific Video Cable Co. Inc. (Pacific), and Southwestern Cable Co. (Southwestern),[9] and by two other CATV systems.

[9] Trans-Video Corp. (Trans-Video) owns Pacific and has a majority interest in Mission.

The petitioners' systems, instituted prior to February 15, 1966, carry the signals of between six and nine Los Angeles television stations into various parts of the San Diego area. San Diego has two VHF television stations (KFMB–TV and KOGO–TV), and one UHF station (KAAR), in operation. A construction permit has been issued for another UHF station, and there is an application on file for a non-commercial UHF educational station. The area is also served with ABC network programs by a VHF station, XETV, across the border in Tijuana, Mexico. If and when the two UHF stations go on the air, San Diego will have a full pattern of service.

Midwest Television, Inc. (Midwest), the licensee of station KFMB–TV, filed a petition with the Commission on March 17, 1966, pursuant to the new rules, requesting immediate temporary and permanent relief from the extension of CATV service into new geographical areas in the San Diego area by the petitioners' CATV systems (R. 1–56). Midwest alleged that none of the areas involved were within the calculated or measured Grade B contours of any of the Los Angeles stations carried except for the northern portion of the city of San Diego; that there had been a recent increasing tempo of CATV line extension activity into new areas within KFMB–TV's Grade A contour; that the expansion of distant-signal service would fragment the audiences of the local San Diego stations; and that even though KFMB–TV and the local UHF station, KAAR, are carried by the CATV systems, their signals are degraded.

Midwest further urged that although some of the Los Angeles stations may provide some Grade B coverage in San Diego, it was undesirable to permit CATVs to import Los Angeles signals into San Diego, because the quality of the Los Angeles signals would be equalized with that of the San Diego stations, to the detriment of the local stations and local San Diego television service. Midwest requested the Commission immediately to restrict carriage of the Los Angeles signals to those geographic areas within which the petitioners' CATV systems were operating on February 15, 1966. Similar permanent relief of this sort was also requested. Midwest filed a supplement to this petition on April 4, 1966, showing the geographic areas served by the CATV systems as of February 15, 1966, and the new areas where service had been instituted since that time (R. 121–144).

In a joint opposition (R. 194–263), Pacific, Mission and Trans-Video alleged that Midwest had failed to show irreparable injury to itself or to the public; that they had not extended signals to new geographic areas; and that the requested temporary relief would injure the respondents and the public. Southwestern, in its opposition (R. 265–328), alleged that its system was not carrying any station beyond its Grade B signals; that its system was "grandfathered" and had not expanded into new areas; that CATV helps UHF; that degradation of KFMB–TV's signal is not a problem; and that irreparable harm would be done to it by a grant of temporary relief. The petitioners also challenged the Commission's authority to grant the requested relief.

In a Memorandum Opinion and Order released July 25, 1966 (R. 577–598) (as corrected by an erratum of July 26, 1966), 4 F.C.C. 2d 612, the Commission found "a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area," so far as the question of the effect of the CATV operations on the growth of UHF was concerned.[10] The Commission sought to maintain the *status quo* by directing petitioners, pending the hearing, not to expand their systems into new areas in which they had not been operating on February 15, 1966, although it specifically permitted the continuation of service to new subscribers obtained since February 15, 1966. The limitations imposed were solely upon the carriage of the Los Angeles stations to new subscribers and did not restrict further expansion *per se*.

Petitioners filed motions to stay the above Commission's stay order pending the determination of this case on the merits. In an Order of August 23, 1966, this Court stayed the Commission's order insofar as the Commission's order prevents petitioners from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966. In all other respects the Commission's order was permitted to stand.

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[10] The question of whether the Grade B contours of the Los Angeles stations reach into San Diego was not determined by the Commission, since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. The policy considerations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego. (Second Report and Order, footnote 69 and paragraphs 113–149, 31 F.R. at 4557–4562, 2 F.C.C. 2d at 770–786).

## QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether the Federal Communications Commission has jurisdiction to regulate the importation by a community antenna television system of television signals from another city to insure that such importation will not impair the availability to the public of an equitable allocation of television broadcast service.

2. Whether the Commission has authority to halt the growth of a CATV system pending a full hearing to determine the impact of the system upon television broadcasting and, if so, whether the interim order must be based upon an adjudicatory hearing record.

3. Whether the Commission's rules conflict with the constitutional protection of free speech.

4. Whether the Commission's notice of rule making complied with the requirements of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a).

## SUMMARY OF ARGUMENT

### I

The Commission has exercised limited jurisdiction over CATV systems to insure that they will be of value as supplements to the television broadcast service whose signals they use, without destroying the basic allocation of "free" television service. This action was within the jurisdiction conferred upon the Commission by Congress. CATV systems are engaged in communication by wire in interstate commerce, to which the Communications Act is specifically made applicable. They are also a practical

extension of the service of television stations. Therefore, the Commission could make rules to prevent the growth of CATV systems from frustrating the Commission's duty to provide a fair, efficient and equitable allocation of television service to the various communities of the United States.

II

Since the Commission has authority to make all rules necessary in the execution of its functions and to carry out the provisions of the Communications Act, it could provide by rule for the issuance of orders to limit CATV expansion pending an adjudicatory hearing to determine the impact of CATV service upon the public in a particular community. In this case, the Commission had ample ground for taking such action. It did not act *ex parte*, but only upon consideration of the pleadings and affidavits of the parties. It was not summarily revoking an authority previously granted, and an adjudicatory hearing on the question of the issuance of a stay order was required by neither due process nor statute.

III

The Commission's rules do not violate the constitutional protection of free speech. The rules constitute a reasonable regulation of the use by CATV systems of radio signals. They do not affect the right of petitioners to originate program material. The narrow regulation involved does not impair any protected right of free speech.

IV

The Commission's rule making proceeding complied with the notice requirements of Section 4(a) of the Administrative Procedure Act. That statute requires notice only of the subjects and issues involved, and the Commission's notice of rule making advised all parties that one of the subjects involved was the determination of the impact of CATV and the subordinate question of how to limit the growth of CATV pending resolution of the basic impact question. The rules adopted came well within the subject matter and issues proposed in the notice of rule making.

ARGUMENT

**I. The Communications Act of 1934 gives the Federal Communications Commission the authority it has asserted over community antenna television systems**

The Federal Communications Commission has imposed upon CATV systems the degree of regulation it deemed necessary to insure that CATV service will be of maximum benefit in distributing television signals to the American public and that it will not destroy the basic television service which gives it all its substance. The rules relate only to the use made of television broadcast signals, and they limit that use only for the purpose of maintaining both local "free" television service and CATV service as coordinated components of a nationwide television service. The rules do not limit or affect a CATV system's origination and distribution of its own programs; they do not license CATV systems as television stations are licensed; they do not regulate the fees charged. They

do carry out, "[t]he avowed aim of the Communications Act of 1934 * * * to secure the maximum benefits of radio to all the people of the United States," for, "[t]o that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943).

The Commission recognized that its jurisdiction was not a question free from doubt. Before it decided the question, it requested the views of all interested persons (Notice of Inquiry and Notice of Proposed Rule Making, 30 F.R. 6078). In the Second Report and Order adopting the new CATV rules, it carefully canvassed and considered these views (pars. 5–19, 31 F.R. 4540–4543, 2 F.C.C. 2d at 726–734), and prepared, in addition, a comprehensive legal memorandum on its jurisdiction (Appendix C to Second Report and Order, 31 F.R. at 4567–4568, 2 F.C.C. 2d at 793–797, Appendix B hereto). In the interest of avoiding needless repetition, we hereby respectfully refer the Court to these discussions as constituting a clear and concise statement of the basis for the Commission's assertion of jurisdiction, and will devote our major effort in this brief to discussing the contentions advanced by the petitioners before this Court.

The Commission's rationale may be summarized as follows:

In the Communications Act of 1934, Congress created the Federal Communications Commission in order to centralize authority in that agency to carry out the Congressional purpose to provide for a com-

prehensive regulation of interstate and foreign commerce in communication by wire and radio. Section 2(a), 47 U.S.C. § 152(a), accordingly states that, "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, * * *"

Community antenna systems clearly constitute wire communication under Section 3(a) of the Act, 47 U.S.C. § 153(a), which includes "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Community antenna systems also constitute interstate transmissions under Section 3(e). This is so because the transmission of a television station is in interstate commerce, *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U.S. 266 (1933); *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650 (1936), and the extension of such an interstate communication by a CATV is a part of the interstate transmission, although the extension itself be entirely within one State. *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *California Interstate Telephone Co.* v. *Federal Communications Commission,* 117 U.S. App. D.C. 255, 328 F. 2d 556 (1964); *Ward* v. *Northern Ohio Telephone Co.,* 300 F. 2d 816 (C.A. 6, 1962), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.,* 4 Pike & Fischer, Radio

Regulation 2d 145 (1964). The community antenna system is a part of the interstate transmission even if it be deemed merely a reception apparatus. *Fisher's Blend Station, Inc.* v. *State Tax Commission, supra; Western Union Tel. Co.* v. *Foster,* 247 U.S. 105 (1918).

The Commission has authority under section 303(h) of the Act, 47 U.S.C. § 303(h), to "establish areas or zones to be served by any station," and it is commanded by section 307(b), 47 U.S.C. § 307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission also has broad authority to perform all acts necessary to the execution of its functions. Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r).

It would be unrealistic to ignore the fact that a community antenna system is in practical effect, as well as in legal contemplation, a part of the transmission of the television signal to the public. *Clarksburg Publishing Co.* v. *Federal Communications Commission,* 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955). This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943), the Commission has authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the

Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).[11]

In view of these considerations, the Commission held (Second Report and Order, Par. 12, 31 F.R. 4541–4542, 2 F.C.C. 2d at 730):

> * * * CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)). Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. [Footnote omitted.]

The petitioners in Case No. 21192 attack the Commission's jurisdiction on several grounds. They assert principally (Br. 15–21) that "the Commission has two principal and separate functions"—to regulate common carriers and to license radio stations—and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate.

Petitioners do not appear to dispute the proposition that they are engaged in interstate communications.

[11] This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals.

And even they must recognize (Br. 16) that the Communications Act in terms states that its provisions, "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *" Section 2(a), 47 U.S.C. § 152(a). Nowhere in the statute has Congress stated that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to import such language into an Act designed to grant to the new Communications Commission not only a centralization of authority theretofore granted to several agencies but also "granting additional authority with respect to interstate and foreign commerce in wire and radio communication." Section 1, 47 U.S.C. § 151.[12] If Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

The dichotomy of precise common carrier and radio licensing functions urged by petitioners is not only a concept at odds with the express language of a statute

[12] This express language of the Communications Act is at odds with petitioners' assertion (Br. 16–17) that so far as wire communications are concerned, the Commission was given only the common carrier jurisdiction previously lodged in the Interstate Commerce Commission, and the committee reports relied upon by petitioners do not so state. What they do state is that so far as the common carrier jurisdiction of the new Communications Commission was concerned, many provisions were taken verbatim from the Interstate Commerce Act.

designed to cover all forms of interstate communication, but is one which the courts have already indicated is not consistent with the statute. Thus, in *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* — U.S. App. D.C. —, 359 F. 2d 282, 284 (1966), in sustaining the Commission's decision that CATV systems are not common carriers, the Court stated:

> * * * Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.
>
> * * * * *
>
> Its [the Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation of the CATV systems under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners.

> This seems to us a rational and hence permissible choice by the agency. [Footnote omitted.]

While the Court stated that it was not ruling on the Commission's jurisdiction, petitioners' dichotomy is, we believe, foreclosed by that decision. The United States Court of Appeals for the District of Columbia Circuit has similarly sustained the Commission's decision to examine the impact of CATV operations upon television broadcast service in connection with the grant of a common carrier radio license to serve the CATV system, against the argument that this consideration of competitive effects was to bring "broadcast" regulation into the common carrier field. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission,* 116 U.S. App. D.C. 93, 96, 321 F. 2d 359, 362 (1963), *cert. den.* 375 U.S. 951. The Court stated, "It [the Commission] cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958)." [13]

[13] It is significant that the Court of Appeals, dealing with common carrier regulation in the *Carter Mountain* case, and the Supreme Court, dealing with broadcast regulation in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 214 (1943), both referred to Section 1 of the Act which states the Congressional "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at rea-

Since CATV systems extend the service areas of television stations (a matter committed to Commission concern by Section 303(h) of the Act), are in interstate communication under Section 3, and have the capacity to frustrate the fair and efficient allocation of television service which the Commission is commanded by Section 307(b) [14] to achieve, the Commission properly invoked the authority given it by Sections 4(i) and 303(r) to make rules and regulations, not inconsistent with the Act, to carry out its functions and the provisions of the Act.

In a field where Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation" because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219, 220 (1943), petitioners' cramping construction is un-

sonable charges; * * *" This demonstrates that the Act does not perpetuate narrow and disconnected regulatory concepts, but rather creates a unified mode of regulating all interstate communications under an empirical public interest test.

[14] Petitioners' attempt to denigrate the importance of Section 307(b) and to suggest that it "has nothing to do with the establishment of any communications policy" (Br. 20–21), is difficult to understand. Section 307(b) contains an overriding command, and one which fully authorizes the Commission not only to act upon individual applications, but also to protect future service by allocating channels in advance of immediate demand for them. *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954).

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tenable. This was made amply clear by the Supreme Court's decision in *National Broadcasting Co.* v. *United States, supra,* and was again confirmed in its decision in a similar field in *American Trucking Associations* v. *United States,* 344 U.S. 298 (1953).

In the *American Trucking Associations* case, the Interstate Commerce Commission adopted rules governing the use by motor carriers of leased and interchanged equipment which was otherwise exempt from Commission regulation under the statute. The purpose of the rules, as the Court stated (344 U.S. at 310), "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." Although the leasing practices proscribed by the new rules were nowhere specifically committed to the agency's jurisdiction by the statute, the Court sustained the proscription on the basis of the grant of general rule making power necessary for enforcement of the Act's provisions, recognizing that the specific powers granted would be meaningless without the correlative power to prevent frustration of the Act's purposes. It stated (344 U.S. at 311):

> So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress. Included in the Act as a duty of the Commission is that "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." § 204(a)(6). And this necessary rule-making power, coterminous with

> the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," regulation of which is vested in the Commission by § 202(a). See also § 203(a)(19).

The situation now before this Court is at least as strong for affirmance as that before the Supreme Court in *American Trucking Associations*. An operation which is unquestionably comprehended by the statute as an interstate communication has raised the spectre of frustration of enforcement of the Act, and so may be dealt with under broad rule making powers.[15]

Petitioners urge, finally (Br. 25–30), that the Commission has previously denied that it has jurisdiction over CATV, and that it has unsuccessfully sought to obtain such jurisdiction from Congress. The Commission fully discussed this contention in the Second Report and Order (pars. 16–19, 31 F.R. at 4542–4543, 2 F.C.C. 2d at 732–734, Appendix B *infra*). That discussion makes clear that the Commission had not previously stated in unequivocal terms that it did not have jurisdiction over CATV, and that in any

[15] That the Commission may deal with interstate communications does not, of course, also signify that it may deal with the manufacture of television receivers or their use by individual members of the public. The "legally significant difference" which petitioners cannot see (Br. 23) seems obvious to us. CATVs communicate and members of the public watching television at home do not. See *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (D.C. S.D. N.Y. 1966) *appeal pending* (C.A. 2).

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event such a disclaimer would not prevent the Commission from correcting an erroneous ruling. We rely upon that discussion and respectfully refer the Court to it. Only one further comment should be added. The Commission's recent request to Congress to amend the Act did not constitute an admission that jurisdiction over CATV did not exist. As the Commission stated in the Second Report and Order (Par. 153, 31 F.R. at 4564, 2 F.C.C. 2d at 787):

> There are four areas which we shall urge to the Congress as particularly warranting its attention:
>
> (i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. (See notice, par. 31, 1 FCC 2d at p. 465.) [16]

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[16] See also Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 89th Cong., 2d Sess., on H.R. 14921, p. 1035:

"Senator MAGNUSON. That is the question I wanted to ask. You people honestly feel that you need some congressional reassurance of your authority?

"Mr. HYDE. We think it would be helpful to us.

"Senator MAGNUSON. I do not mean helpful to you. I mean legal authority.

"Mr. HYDE. No, sir.

"Senator MAGNUSON. I am talking legally. Do you need something in addition to what you now have?

"Mr. HYDE. No, sir. We think we are acting within the authority granted to us to regulate interstate communications.

"Senator MAGNUSON. You have the authority?

"Mr. HYDE. We do. But you will remember that the author-

In considering the Commission's request, the House Committee on Interstate and Foreign Commerce reported out H.R. 13286, a bill to amend the Communications Act to give the Commission authority to issue rules and regulations with respect to CATV. H. Rept. No. 1635, on H.R. 13286, 89th Cong., 2*d* Sess. While the Report specifically refused to agree or disagree with the Commission's conclusions as to its jurisdiction (see p. 9), its significance is that Congress, so far as it has given any indication of its views, has moved to confirm the Commission's power and has, with full knowledge of the exercise of jurisdiction, taken no action to change the Commission's course. The minority views quoted *in extenso* by petitioners have no force, as either authority or legislative history, beyond their inherent power to persuade.

The Commission's rules are consistent with the Act and necessary to its enforcement. For the reasons set forth, we urge that they have been adopted within the confines of the authority granted by Congress.

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ity under which we are acting was granted before there was any such thing as community antenna system, and naturally Congress might very well wish to give us more direction in this area.

"Senator MAGNUSON. Well, it is my understanding—your proposal is for Congress to, if they saw fit, to give you some direction—

"Mr. HYDE. That is right, sir.

"Senator MAGNUSON. Rather than to give you more legal authority.

"Mr. HYDE. We think that we are correct in our assertation of legal authority to act."

**II. The Commission acted within its statutory authority in directing petitioners to limit the growth of their operations pending the hearing**

The sole argument of petitioner Southwestern, which Mission *et al.* incorporated by reference, is that the Commission exceeded its statutory authority in directing petitioners to limit further expansion of their operation bringing in Los Angeles signals pending the hearing on the impact of CATV in San Diego, because the stay order was not based upon an evidentiary hearing. Southwestern urges specifically that the order is in effect a cease and desist order invalidly issued without compliance with the procedural requirements of Sections 312(b) and (c) of the Communications Act, 47 U.S.C. §§ 312(b) and (c), which, it claims, is the only statutory source of the Commission's power to issue an order of this nature. Petitioner's argument rests upon a mistaken premise, since the Commission's order was not a cease and desist order. The order constituted a valid exercise of the Commission's broad powers under Sections 4(i) and 303(r), 47 U.S.C. §§ 4(i), 303(r), to take all action necessary in the execution of its functions or necessary to carry out the provisions of the Act.

First, it is clear, we believe, that the order was not a cease and desist order issued without the procedural safeguards of Section 312. The Commission did not purport to act on the basis of Section 312 and, contrary to petitioner's suggestion, could not have done so even if it had complied with the procedural requirements of that section. Section 312 authorizes the Commission to issue a cease and desist order in three

specific situations. The section states that an order may issue (47 U.S.C. § 312(b)):

> Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

As petitioner concedes (Southwestern Br. 13), the Commission has not found that petitioner's operations are in violation of Section 74.1107 of the Rules, or any other rule or statutory provision. The Commission has assumed that petitioners' systems are within the Grade B contours of the Los Angeles stations (R. 589). Thus, the Commission's order was not, and could not have been, predicated upon Section 312.

Moreover, the cease and desist order provided for in Section 312 is permanent in nature, and enjoins a continuation of past conduct or operations that the person "has" engaged in. The order involved here is temporary, to be in effect pending the hearing.[17] The order does not require a suspension of existing opera-

[17] In urging that the order should not be considered temporary because the evidentiary hearing may consume a considerable period of time, petitioners point to the fact that the commencement of the hearing, originally scheduled for September 27, 1966, has been postponed to December 6, 1966. But this postponement was granted at petitioners' request. (Docket No. 16786, Tr. 87–88.) In any event, the length of the hearing does not affect the nature of the stay order.

tions; it merely directs petitioners not to acquire new subscribers in certain areas or expand their delivery of Los Angeles signals into new areas pending the hearing. Thus, the Commission's order is not the type of order contemplated by Section 312. It is not a remedy for past misconduct.

The Commission's order has an entirely different basis. The statutory basis asserted by the Commission was as follows (R. 596–597):

> * * * we have determined in the second report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in sections 74.1107 and 74.1109 of our rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing; see *Federal Trade Commission* v. *Dean Foods Co.*, — U.S. —, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority

> for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission,* 327 F. 2d 893, 896–897 (C.A.D.C., 1964). * * *

The questions presented are whether Sections 4(i) and 303(r) of the Act empower the Commission to take action of this nature in aid of the Commission's substantive functions, and whether the procedures followed by the Commission accord with due process.

As we pointed out in Point I, Congress has endowed the Commission in the Communications Act with "expansive" and "comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943), including broad authority to take such action, not inconsistent with the Act or other law, as is necessary in the execution of its functions or to carry out the provisions of the Act. Section 4(i), 47 U.S.C. § 154(i), provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

In addition, Section 303 of the Act, 47 U.S.C. § 303, grants the Commission broad authority to regulate the use of radio as the "public convenience, interest, or

necessity requires," and, upon the basis of this criterion, empowers the Commission to:

> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *.

The Commission's determination that it was necessary in the public interest to limit the growth of petitioners' CATV operations pending the hearing rests on compelling considerations. In the Second Report, the Commission had found that serious public interest questions were presented by CATV proposals to bring signals from one major community into another major television market. These questions are: (1) whether a substantial CATV growth in major television markets based upon "outside" signals would preclude the establishment and maintenance of UHF stations in the community or seriously degrade their service to the public, (2) whether such CATV growth would require these stations to face susbtantial competition of a patently unfair nature which would adversely affect their service to the public, and (3) whether the "sale" of broadcast signals would be used by CATV as an economic base for Pay TV operations, without prior authorization of the Commission or Congress and before resolution of important policy issues as to Pay TV. Second Report and Order, 31 F.R. 4540, 4557–4562, 2 F.C.C. 2d 725, 770–781.

The Commission stressed the seriousness of these questions to the public, and their direct relationship to the Commission's functions in executing the legis-

lative mandate. It pointed out (Second Report and Order, 31 F.R. at 4557, 2 F.C.C. 2d at 770), that "UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation," by which "Congress made the judgment that development of UHF 'is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States' (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 7)." While the legislation "is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities" (Second Report and Order, 31 F.R. at 4557, 2 F.C.C. 2d at 771), the Commission concluded that the legislative goal might be thwarted if CATV operations in the larger cities should grow to substantial proportions, explaining (Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 774):

> The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10-percent share in most markets in the prime time) and this limited audience might be greatly reduced

> since very substantial numbers of people interested in viewing the nonnetwork programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programming. * * * As pointed out, the nonduplication provision would afford virtually no relief, since nonnetwork programming is not distributed on anything like a simultaneous nationwide basis. * * * Finally, we point out that it is not just a matter of causing the demise of the independent UHF station; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50-to-85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

The Commission was also especially concerned about the present special competitive situation under which CATV operates under one set of rules for program acquisition and the broadcaster under an entirely different set (Second Report and Order, 31 F.R. at 4560–4562, 2 F.C.C. 2d at 778–781). Whereas a television station normally obtains the right to exhibit nonnetwork programs by outright payments to program

suppliers and usually secures the exclusive right to exhibit the programs within a particular geographic area and for a particular length of time, a CATV system presently stands outside the program distribution process.[18] The CATV system does not pay program suppliers for its programs or bid against the broadcaster for distribution rights, nor does it respect the exclusivity for which the broadcaster has bargained and paid. Concerning the effect of this double standard on the UHF independent station, the Commission stated (Second Report and Order, 31 F.R. at 4561, 2 F.C.C 2d at 779):

> Procuring attractive programming which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive rights for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a

[18] See *United Artists Television, Inc.*, v. *Fortnightly Corporation*, 255 F. Supp. 177 (D.C. S.D.N.Y., 1966), *appeal pending*, (C.A. 2), holding that CATVs are fully liable for copyright infringement. This decision is pending on appeal in the Second Circuit. Moreover, Congress is currently considering amendments to the Copyright Law which would make CATV liable for copyright infringement, in whole or in part. H. Rept. No. 2237, 89th Cong., 2d Sess., pp. 77–88.

> station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

For this further reason, the Commission concluded that if CATV growth in metropolitan areas should be substantial, "the result might be most serious for the new UHF independents in these same areas" (Second Report and Order, 31 F.R. at 4560, 2 F.C.C. 2d at 778).

The possibility that CATV competition may destroy or seriously degrade television broadcast service to the public, without itself thereafter rendering the required service, is a matter that the Commission has "not only the power but the duty" to consider in administering the Communications Act. *Carroll Broadcasting Co. v. Federal Communications Commission,* 103 U.S. App. D.C. 346, 349, 258 F. 2d 440, 443 (1958); *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 475–476 (1940). In both the Second Report and in the First Report, the Commission emphasized the fact that CATV is not an adequate substitute for local broadcast service and that it would be inconsistent with the Commission's statutory responsibilities to permit CATV to destroy television service. In the First Report the Commission stated (First Report, 38 F.C.C. 683, 699):

> The distribution of multiple reception services through CATV cannot be permitted to curtail the viability of existing local service or to inhibit the growth of potential service by new broadcast facilities. Because of the prohibitive

> cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States, on a fair, efficient, and equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

See also the Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775.

In addition to its practical shortcomings, CATV does not normally serve as an outlet for local self-expression or present programming tailored to local needs. Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775. The Commission's allocation of television facilities pursuant to Sections 303 and 307(b) of the Act is predicated upon the "desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations" (First Report, 38 F.C.C. at 699–700). It has long

rejected the premise that channel assignments should be clustered in major cities from which satellite communities within an appropriate range would obtain service rather than having broadcast facilities of their own (First Report, 38 F.C.C. at 700).

Thus, if the effect of CATV operations in a major community were to be the substitution for local independent stations of independents from the very largest cities like New York or Los Angeles, this would not only be "contrary to sound allocation principles, long established in section 307(b) of the Act," Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775, but also a "clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia [or San Diego] additional broadcast stations to meet the 'important needs' for 'local programming and self-expression'." H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 4.[19] [Matter in brackets added.]

In sum, there was ample warrant for the Commission's concern in the Second Report and Order that the questions posed by CATV operations in major

[19] In addition, as pointed out above, the Commission was also properly concerned that a form of Pay TV might result from substantial CATV growth in the larger cities ("which would naturally be the backbone of any wire pay-TV operations") without prior authorization of the Commission or Congress and before the resolution of important policy issues (Second Report and Order, 31 F.R. at 4560, 2 F.C.C. 2d at 777). Since 1955 the Commission has been conducting proceedings to determine whether the authorization of broadcast subscription television (or Pay TV) is in the public interest. See Notice of Proposed Rule Making and Notice of Inquiry, in Docket No. 11279, 31 F.R. 5136, 3 F.C.C. 2d 1.

markets are serious, involving threatened harm to the public and frustration of Congressional goals. The Commission properly concluded that its statutory duties required it to explore these questions thoroughly in evidentiary hearings and to authorize proposed "outside signal" CATV operations in major markets only upon a hearing record giving reasonable assurance that the public would not be harmed and that achievement of the purposes of the Act would not be thwarted. This is one of those situations where the public interest requires that conditions conducive to a sound future "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241 (1945).

The Commission deemed it essential to examine these serious questions before proposed CATV operations in major markets become established or well-entrenched. It pointed out (Second Report and Order, 31 F.R. at 4562, 2 F.C.C. 2d at 781–782):

> The basic thrust of congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r) and (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consist-

> ent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

See also Memorandum Opinion and Order of May 25, 1966, 3 F.C.C. 2d 816, 819–820.

Accordingly, the Commission adopted a rule of general applicability (Section 74.1107) staying all new "distant signals" CATV operations in major markets pending evidentiary hearing where it is clear that signals are being distributed beyond their normal Grade B area. It also determined to take up case-by-case the situation where there are two distinct major markets but where a CATV system in one market carrying the signals of stations in the other market may not, because of the closeness of the markets, be extending the signals beyond the Grade B contour. (Second Report and Order, 31 F.R. at 4564, fn. 69, 2 F.C.C. 2d at 786, fn. 69). The problem of halting the growth of existing operations was also one calling for "case-by-case judgment in the particular community as to the feasibility of such action and the appropriate geographical area or areas." Second Report and Order, 31 F.R. at 4563, 2 F.C.C. 2d at 785. The Commission provided for consideration of these situations upon petition under Section 74.1109, pursuant to pleading procedures which would permit af-

fected persons to be heard on the particular circumstances.

After consideration of the pleadings and affidavits of the parties, the Commission concluded that this was a classic case for evidentiary hearing on the public interest questions posed by the expansion of petitioners' systems throughout the San Diego area, and a case falling squarely within the policy of the Second Report and Order (R. 587). It was undisputed, the Commission found (R. 587–88, 592), that there was considerable UHF activity underway in San Diego, that petitioners' systems had commenced operations only recently, and that while these systems then had relatively few subscribers, they had the potential to expand throughout San Diego County under franchises covering an area where approximately 90 percent of all the homes within the Grade A contour of the San Diego stations are located.

In further concluding that interim relief appropriately limiting further expansion pending the hearing was necessary, the Commission stated (R. 588):

> Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief

> appropriately limiting further expansion until resolution of the public interest issues is called for.

Thus, contrary to the assertion of petitioner Mission (Br. 11–15), the Commission's conclusion that it was essential to halt the growth of petitioners' systems pending the evidentiary hearing clearly rests on adequate findings that this action was necessary to avoid threatened irreparable injury to the public.

In contending that Sections 4(i) and 303(r) of the Communications Act do not empower the Commission to take the action found necessary here, Southwestern attempts (Br. 24) to dismiss Section 4(i) as a mere housekeeping provision related to the conduct of the Commission's internal affairs, and urges that some specific statutory authorization like Section 312 is required. But these arguments run counter to settled law.

The Supreme Court has held that Section 4(i), like 303(r), grants "general rule making power" sufficient to sustain the Commission's multiple ownership rules limiting the number of broadcast licenses issued to any one licensee, stating (*United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–203 (1956)):

> The challenged rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rule making authority. 47 U.S.C. Sec. 154(i) and Sec. 303(r) grant general rulemaking power not inconsistent with the Act or law.

The contention that explicit statutory authorization is required was also rejected in *National Broadcast-*

*ing Company* v. *United States,* 319 U.S. 190, 218–220 (1943), where the Court stated:

> True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Provisions similar to Sections 4(i) and 303(r) in other statutes have likewise been construed to grant broad power "coterminus with the scope of agency regulation," which does not depend upon a specific reference in the act. *American Trucking Associations* v. *United States,* 344 U.S. 298, 309–311 (1953); *Public Service Commission of the State of New York* v.

*Federal Power Commission,* 117 U.S. App. D.C. 195, 198–199, 327 F. 2d 393, 896–897 (1964). In the *Public Service Commission* case, the Court stated with respect to Section 16 of the Natural Gas Act, a provision very similar to Sections 4(i) and 303(r) of the Communications Act[20] (117 U.S. App. D.C. at 199, 327 F. 2d at 897):

> All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. * * *

Nor is there merit to petitioner's further contention that the power to issue a temporary stay of further operations pending a hearing is a special power that cannot derive from general authority, at least in the absence of a prior evidentiary hearing. The cases upon which petitioner principally relies in support of this proposition, *Standard Airlines, Inc.* v. *Civil Aeronautics Board,* 85 U.S. App. D.C. 29, 177 F. 2d 18 (1949), and *Trans-Pacific Freight Conf. of Japan* v. *Federal Maritime Board,* 112 U.S. App.

[20] Section 16 of the Natural Gas Act, 15 U.S.C. 717(o), provides in part: "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter * * *."

D.C. 290, 302 F. 2d 875 (1962), involved a kind of action which is clearly distinguishable from the action taken by the Commission here.[21]

In the first place, both of those cases involved a summary suspension of activities previously approved by the agency, rather than a stay of planned operations not yet in being pending a determination as to whether they should be authorized. Thus, in *Standard Airlines* the Civil Aeronautics Board sought to suspend without hearing an air carrier's authority, evidenced by a "Letter of Registration" issued by the Board, pending a proceeding to revoke the registration. The problem before the Court revolved about

[21] Petitioner's reliance (Southwestern Br. 15–16) upon a dictum in *Regents* v. *Carroll*, 338 U.S. 586, 598–599 (1950) is misplaced. In that case, the Commission found, after a hearing, that the public interest would not be served by a renewal of station license because the licensee's contract with a third person jeopardized its financial ability to operate in the public interest. The licensee thereafter breached its contract in order to obtain a renewal of license. The question before the Supreme Court was whether the Commission's action was a valid defense to a state court action for breach of contract under state law, and the Court held that the Commission's powers were limited to licensing and did not include the power to immunize a breach of contract with a third person not subject to the Act. The statement quoted by petitioner was directed to that situation, and clearly was not meant to indicate that the Commission's powers are limited to licensing in all situations, since the Act itself grants the Commission specific authority in many respects other than licensing. See, e.g., Section 303 of the Act, 47 U.S.C. § 303. We are not contending, of course, that the Commission has any authority except that conferred by the Communications Act, or that it has any inherent power to impose sanctions, but rather that the authority conferred by Sections 4(i) and 303(r) includes the power to take the action found necessary here.

the "statutory and constitutional rights of one who has a substantial property investment acquired in dependence upon a Government permit" (85 U.S. App. D.C. at 31, 177 F. 2d at 20). The Court held that the "Government cannot make a business dependent upon a permit" (*Ibid.*) and then condition the authority granted upon suspension without hearing.

Similarly, in *Trans-Pacific* the Maritime Board sought summarily to "prohibit one party (in what is at this stage essentially a private dispute) from enforcing an agreement, previously approved by the Board, made with another private party," pending a final determination as to complaints against the first party (112 U.S. App. D.C. at 295, 302 F. 2d at 880). In holding that Sections 22 and 15 of the Shipping Act (46 U.S.C. §§ 821 and 814) did not authorize interim injunctive relief of this nature because the Board had not made the findings required by those sections, the Court reserved decision on the question of the Board's power to issue an "order prohibiting the parties from carrying out an *unapproved* agreement," stating (112 U.S. App. D.C. at 294, fn. 8, 302 F. 2d at 879, fn. 8):

> We need not express a view as to whether such an order is within the Board's authority. But we do note that different considerations might well be involved in such a case.

This fundamental distinction between stopping an activity previously authorized by the agency and declining to permit the commencement of activities not yet authorized by the agency or found to be in the

public interest, is reflected throughout the Communications Act. Thus, the Act requires the Commission to accord a full hearing before a station license or construction permit may be revoked (47 U.S.C. § 312) or modified by the Commission (47 U.S.C. § 316), or before any person can be ordered to cease and desist from conduct alleged to violate a license, the Commission's rules, or the Act. (47 U.S.C. §§ 312(b) and (c)). Under these sections, a shorter procedure is permitted only "where safety of life or property is involved" (*ibid.*). The Act similarly requires a hearing before any order suspending a radio operator's license for past misconduct can take effect (47 U.S.C. § 303(m)). The Act further provides that pending any hearing on an application for renewal of license, "the Commission shall continue such license in effect" (47 U.S.C. § 307(d)).

The same Congressional concern that activities previously authorized by an agency not be suspended pending a final determination as to their continued authorization is reflected in Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 1008(b), which provides that where a licensee has made timely and sufficient application for renewal of license, "no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

However, the Act is also clear that where public interest questions are present, operations may not be commenced prior to hearing. As the Commission pointed out (Second Report and Order, 31 F.R. at

4562, 2 F.C.C. 2d at 781–782), the "basic thrust of Congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop." Thus, under Sections 301 and 309 of the Act, 47 U.S.C. §§ 301 and 309, public interest questions must be resolved in hearing before the Commission can authorize radio station operations which it has not previously authorized, and before such operations can commence. No person has a right to operate until that hearing has been held.[22]

The legislative concern that the Commission's resolution of public interest questions in initial licensing take place before any entrenchment occurs is also the basis for Section 319(a) of the Act, 47 U.S.C. § 319(a), which prohibits the issuance of a license for the operation of any station unless a permit for its construction has been granted by the Commission. The intent of Congress was to avoid pressure upon the Commission stemming from premature construction and expenditures.[23] This Congressional purpose

[22] The Act permits an exception to this requirement only for a temporary period, and upon a Commission finding that "there are extraordinary circumstances requiring emergency operations in the public interest" (47 U.S.C. § 309(f)).

[23] A statutory provision similar to Section 319(a) was first enacted as Section 21 of the Radio Act of 1927. For the original legislative intent, see, *e.g.*, 64 Cong. Rec. 2793; H. Rept. No. 1416, 67th Cong., 4th Sess., p 4; Hearings Before the Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess., p. 117.

was more recently reiterated in the process of amending Section 319 of the Communications Act. The House Committee on Interstate and Foreign Commerce, in submitting House Report No. 417, 83rd Cong., 1st Sess., on H.R. 4557 (May 13, 1953), stated (pp. 1–2):

> The statutory requirement that a construction permit must first be secured for any radio station for whose operation a license is applied for is based upon the congressional intent of keeping the Federal Communications Commission free from the pressure which might otherwise be exerted by an applicant for a radio-station license who has made considerable expenditures towards construction of a station without having previously obtained an authorization for its construction. It appears that this consideration applies primarily to broadcast facilities which require costly land installations for which building sites must be acquired, and for which special buildings and special transmitting equipment must be constructed. Once these investments have been made, they are difficult to liquidate. Under these conditions, the Commission might be reluctant to refuse a license once such expenditures have been made by the applicant.

The Commission's order here falls into the category of prohibiting expenditures and growth until all of the significant public interest questions are resolved. The order does not require a cessation of existing operations or preclude petitioners from serving any subscriber acquired up to the date of that

order (R. 593).[24] It is directed solely toward the expansion of petitioners' operations (insofar as Los Angeles signals are concerned) into new areas pending the hearing on the public interest questions presented. Accordingly, the Commission's action carries out the basic scheme of the Communications Act and is fully consistent with *Standard Airlines* and *Trans-Pacific.*

A second distinction between those cases and this one is the nature of the competing public and private interests involved. Even where existing operations are affected, an agency may be able to take temporary injunctive action pending hearing. *R. A. Holman Co., Inc.* v. *Securities and Exchange Commission,* 112 U.S. App. D.C. 43, 299 F. 2d 127 (1962), *cert. denied* 370 U.S. 911. In the *Holman* case, in order to protect the securities-purchasing public, the SEC suspended, pending a hearing, a broker dealer's exemption from the need to register certain securities. The Court rejected the assumption that a hearing was required prior to the taking of agency action of that sort, and sustained the SEC's action on the basis of

[24] While the order specifies boundaries existing on February 15, 1966, it permits petitioners to continue service to any persons requesting service between that date and the date of the Commission's order (R. 593). Moreover, under the Court's order of 1966, petitioners may continue to make drops and deliver Los Angeles signals to all subscribers on lines constructed as of the date of the Court's order. Since the Commission has no desire to cause a disruption of existing service, and does not consider such action necessary or practical on a temporary basis, it would not alter this situation pending the outcome of the hearing in the event of an affirmance.

its broad general powers, stating (112 U.S. App. D.C. at 47, 299 F. 2d at 131):

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.

The Court distinguished its prior decisions in *Standard Airlines* and similar cases on the ground that they "involved different competing interests," in that no serious harm to the public was threatened in *Standard Airlines* and the injury to the appellant was far more serious (112 U.S. App. D.C. at 48, fn. 9, 299 F. 2d at 132, fn. 9).[25] It should be noted in this connection that in *Trans-Pacific* the Court relied especially on the fact that the Maritime Board made no public interest finding of "detriment [to] the commerce of the United States," but found rather that only the private "complainants were threatened with irreparable injury" (112 U.S. App. D.C. at 294, 302 F. 2d at 879).

We have already demonstrated at some length (*supra,* pp. 43–46), the basis for the Commission's conclusion that it was necessary to halt the growth of petitioners' operations pending the hearing, to

[25] Indeed, even in *Standard Airlines* the Court had recognized that: "the important theoretical aspects of governmental power and the restrictions upon such power are not the whole of the necessary consideration. There are practical aspects also. The facts depict the necessities, whether for the exercise of power or for the restraint of it. It is upon the pattern of practicalities that this case must be studied and decided." 85 U.S. App. D.C. at 31, 177 F. 2d at 20.

avoid threatened harm to the public of a serious nature. The Commission also weighed the impact on petitioners and found no injury substantial enough to overcome the possible adverse consequences to the public (R. 596–98, 592–93). In this connection, the Commission stated (R. 592–93):

> It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers, and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwestern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the second report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a rollback is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

While the Commission found that petitioners had made no showing of irreparable injury, it specifically provided that "if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration" (R. 598). Considering the potential irreparable injury to the public, this balancing of the competing interests was clearly reasonable and should not be disturbed by this Court.

Accordingly, we submit that this case is akin to *Holman* and falls within its long-recognized doctrine that "where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing" (112 U.S. App. D.C. at 47, 229 F. 2d at 131).

Finally, notwithstanding petitioner's suggestion that the Commission acted without notice and hearing, it should be noted that the Commission's order was not issued summarily, but rather in accordance with the procedures prescribed in Section 74.1109 of its rules, which afforded petitioners notice and an opportunity to be heard. (See Appendix C hereto.) Section 74.1109 provides that a petition filed under that section "shall be accompanied by an affidavit of service on any CATV system * * * who may be directly affected if the relief requested in the petition should be granted" (subsection (b)). Subsection (c)(1) requires that the petition "state fully and precisely all pertinent facts and considerations relied upon to

demonstrate that a grant of such relief would serve the public interest" and requires further that "Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them." Subsection (d) provides for the filing of oppositions to the substance of the petition, similarly supported, and subsection (g) provides a separate opportunity to be heard expeditiously on any request for temporary relief. Subsection (g) states:

> Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

Petitioners fully availed themselves of their opportunity to be heard under Section 74.1109 and, in addition, filed a number of other pleadings and motions (R. 577–78, fn. 1). The Commission considered the factual showing and legal arguments made by petitioners at some length in its opinion (R. 581–584, 588–589, 592, 596–598). It concluded that the ultimate questions presented by the request for permanent relief and petitioners' opposition could not be resolved upon the basis of the pleadings, and designated these matters for evidentiary hearing. As the Commission pointed out (R. 587–588, 592), the salient factors upon which it relied in concluding that this was a classic case calling for evidentiary hearing and temporary

relief under the policy of the Second Report and Order were not denied by petitioners.[26]

Petitioners do not now point to any evidence or argument which they were precluded from adducing or which they would have made in any more extensive hearing on the question of temporary relief. Their contention is rather that the Commission was required to accord them a different sort of hearing, with an opportunity to adduce evidence and argument orally, as a matter of statutory and constitutional right. But this contention, as we have demonstrated, is not supported by the cases relied upon. In the absence of any express provision in the Communications Act requiring oral argument or evidentiary hearing, the Commission has discretion under its general procedural authorization in Section 4(j) to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" 47 U.S.C. § 154(j).[27]

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[26] There was no dispute as to the considerable UHF activity in the San Diego area, the relatively small nature of petitioners' existing operations, the geographical areas and boundaries of such operations, or petitioners' potential for expanding throughout San Diego County under CATV franchises covering approximately 90 percent of the homes within the Grade A contour of the San Diego stations (R. 587–588, 592).

[27] In *Federal Communications Commission* v. *WJR*, 337 U.S. 265 (1949), the Supreme Court rejected the view that the Constitution requires oral argument in all cases, holding that the "right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations" (337 U.S. at 276). The Supreme Court further held that Congress has "committed to the Commission's discretion," by the general procedural authorization in § 4(j), the "questions whether and under what circumstances it will allow or require oral argument, except where the Act itself expressly requires it" (337 U.S. at 281).

On the constitutional question, it bears noting that *Standard Airlines* does not support petitioner's claim that a full-scale hearing would be constitutionally required even for an order of the type involved in that case. The Court stated (85 U.S. App. D.C. at 31–32, 177 F. 2d at 20–21):[28]

> We do not mean to say that for suspension purposes the Board need grant a full-scale hearing such as it might conduct in a revocation proceeding. The nature and extent of the hearing may be appropriate to the action being considered.

In view of all the foregoing, we submit that in ordering a partial and temporary halt to the growth of petitioner's operations pending the hearing, the Commission acted well within its broad powers under Sections 4(i) and 303(r) of the Communications Act, consistent with the scheme of the Act and judicial precedent, and accorded petitioners due process. Pertinent here is the admonition of the Supreme Court in *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 203 (1956):

> The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in

[28] While the Court went on to state in *Standard Airlines* that oral argument was necessary, citing its decision in *WJR* v. *Federal Communications Commission*, 84 U.S. App. D.C. 1, 174 F. 2d 226 (1948), the *WJR* case was shortly thereafter reversed on this point by the Supreme Court. *Federal Communications Commission* v. *WJR*, 337 U.S. 265 (1949).

specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. [Footnote omitted.]

### III. The Commission's order did not infringe upon the constitutional protection of free speech

Petitioners Mission, *et al.*, contend in Case No. 21192 (Br. 30–45) that the Commission's "top 100 market" rules violate the Constitutional protection of free speech.[29] While we agree with much of what petitioners say with respect to the general application of the First Amendment, we believe that the particular claim made here has been essentially foreclosed by the Supreme Court in *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943).

In the *National Broadcasting Co.* case, the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment.

[29] Petitioners seek to attack not only that part of the rules governing the importation of distant signals into San Diego, but also the carriage and non-duplication requirements of the rules (Section 74.1103, 31 F.R. at 4571), which govern the CATV system's relationship with local television stations. However, these requirements are not involved in the order under review. If petitioners believe those aspects of the rules also to be in violation of the First Amendment, their remedy is to seek review of the rule making. In any event, similar carriage and non-duplication requirements have already been adjudged not to be in conflict with the First Amendment. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d. 359 (1963), *cert. den.* 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission*. 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965).

That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" (319 U.S. at 217). The Court concluded that (319 U.S. at 227):

> * * * The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

If, as we urge in Point I, *supra,* the Commission has been granted the authority by Congress to limit the extension of television broadcast signals into new areas by CATV, the *National Broadcasting Co.* case makes clear that such a limitation raises no substantial free speech question. For the regulation at issue here is merely another aspect of regulation of use of the air waves. CATV systems constitute a part of the

scheme of television distribution which, unlike any other mode of expression, make use of radio signals as a *sine qua non* of their operation.[30]

As the Court of Appeals for the District of Columbia Circuit stated in 1955:

> The Commission will presumably assert jurisdiction to regulate community antenna systems if and when it concludes that such systems provide or are adjuncts of a broadcast service. Its failure thus far to assert such jurisdiction, standing by itself, cannot support a conclusion that the systems are not service within the meaning of the rule. It is unrealistic to overlook the fact that, through the community systems, Clarksburg residents are receiving and are, in a sense, being served by the programs of the Wheeling station. * * * (*Clarksburg Publishing Co.* v. *Federal Communications Commission,* 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955).)[31]

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[30] Thus, the logic of the Commission's position does not, as petitioners suggest (Br. 37), reach other modes of expression which compete with television but which use radio facilities only incidentally. To sustain the Commission here is not to hold that the Commission could inhibit competition from newspapers by the expedient of denying them radio or wire facilities to transmit news. A similar argument pressing limited regulation of a special situation to a supposed logical conclusion, was made and rejected in *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. den.* 375 U.S. 951.

[31] As set forth in Point I, *supra*, CATV systems, although physically located within a single state, nevertheless operate in interstate commerce. Sections 3(a) and (b) of the Communications Act, 47 U.S.C. §§ 3(a), (b); *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *California Interstate Telephone Co.* v.

Thus, the Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it.

Petitioners also suggest, without apparent relevance to this free speech issue, that consideration by the Commission of the effects of CATV competition upon television service is improper. Their reliance (Br. 38–40) in this regard upon *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940), is totally misplaced. While Congress did not subject broadcasting to a public utility type regulation, it also did not remove the effects of

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*Federal Communications Commission*, 117 U.S. App. D.C. 255, 328 F. 2d 556 (1964); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6, 1962), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, 4 Pike & Fischer, Radio Regulation 2d 145 (1964).

A community antenna system is a part of the interstate transmission even if it were to be deemed merely a reception apparatus. *Fisher's Blend Station* v. *The Tax Commission*, 297 U.S. 650 (1936); *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1918). However, it is also clear that CATVs are not merely passive receivers. See *United Artists Television, Inc.* v. *Fortnightly Corporation*, 255 F. Supp. 177 (D.C., S.D.N.Y., 1966), *appeal pending* (C.A. 2).

competition from Commission consideration, as the *Sanders Brothers* case makes amply clear. The Supreme Court held that economic injury *per se* to an existing station is not a ground for denying a new application, but it also held that the question of the effect of competition upon the public is a matter for Commission consideration (309 U.S. at 475–476). The Court stated (309 U.S. at 475–476):

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. * * *

See also *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).[32] Thus, the Commission's treatment

[32] See also *Logansport Broadcasting Corp.* v. *United States, 93* U.S. App. D.C. 342, 210 F. 2d 24 (1954), sustaining the Commission's power to allocate television channels to communities throughout the United States by general rule making. The Court specifically rejected the argument petitioners

of competition by CATV is in accord with traditional standards in the radio field, standards which have not been thought to raise any free speech question.

Petitioners recognize (Br. 35) that the free speech argument has already been rejected where the Commission has denied a radio license to a common carrier seeking it for the sole purpose of serving a CATV whose operation threatened the viability of the only local television station, and which had not agreed to carry the local station and refrain from duplicating its programs. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission,* 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. den.* 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965). The situation presented here, although it concerns the direct regulation of the CATV systems, rather than the grant of a radio license to serve a CATV, is indistinguishable from the standpoint of the impact of the First Amendment. In both cases what is involved is reasonable regulation of the use of the airwaves in the public interest.

It is important to point out, in conclusion, that the Commission's rules contain no restrictions of any sort on petitioners' right to originate ther own programs. No expression by petitioners is involved. Petitioners are restricted only in the use they make of signals broadcast by others. *Weaver* v. *Jordan,* 49 Cal. Rep. 537, 411 P. 2d 289 (1966), *cert. den.* 35 Law Week

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apparently make here (Br. 40–42), i.e., that the Commission cannot restrict competition by considering the needs of a community for which there is no immediate application.

3126 (Pet. Br. 32–33), is therefore not in point. In that case the Supreme Court of California struck down, as inconsistent with the First Amendment, an absolute prohibition against the origination of programs by a wire Pay-TV system, and the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That decision, in our view, was carefully drafted so as not to prohibit the kind of limited regulation embodied in the Commission's CATV rules.

In sum, the regulation of the air waves is an exercise of the commerce power, *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), and Congress may subject their use to reasonable regulation in the public interest,[33] whether the use of radio signals be made by radio and television stations or by CATV systems. Such regulation which, as we have shown above in Point I, is reasonably related to valid objectives, is not an infringement upon the rights of free speech of either the CATV system operator or the viewing public.

**IV. The Commission gave adequate notice of the provisions for hearing and temporary stay adopted in Section 74.1109**

Petitioners Mission *et al.* urge in Point V of their brief (pp. 46–53) that Section 74.1109 of the Commission's rules, 47 CFR 74.1109, under which the

[33] With respect to the use of the airwaves by television stations, it has been said that, "Television and radio are affected with a public interest: the Nation allows its air waves to be used as a matter of privilege rather than of right." *Television Corporation of Michigan* v. *Federal Communications Commission*, 111 U.S. App. D.C. 101, 104–105, 294 F. 2d 730, 733–734 (1961).

Commission ordered a hearing on the impact of CATV in San Diego and determined to maintain the *status quo* pending that hearing, was illegally adopted because of a failure to give the notice required by Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a). We believe it to be readily demonstrable that the rule making proceeding fully apprised all interested parties of "the subjects and issues involved" in compliance with the Administrative Procedure Act and, indeed, advised them of the substance of the rule finally adopted.

It should be noted at the outset that Section 4(a) does not require notice of the terms or the substance of a proposed rule, but rather "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Thus, the agency need not publish in advance the precise rule finally adopted, or all of the possibilities for resolving the issues. *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 684–685 (C.A. 9, 1949), *cert. den.* 338 U.S. 860; *Wilson & Co.* v. *United States,* 335 F. 2d 788 (C.A. 7, 1964), *cert. den.* 380 U.S. 951; *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954). And, in its final action, it may properly take account of further proposals submitted to it in the course of the proceeding. *Owensboro on the Air, Inc.* v. *United States,* 104 U.S. App. D.C. 391, 262 F. 2d 702 (1959), *cert. den.* 360 U.S. 911. As petitioners recognize (Br. 46), what is required is that the notice of rule making "fairly apprise interested persons of the issues involved, so that they may present relevant data or argument." H. Rept. No.

1980, 79th Cong., 2d Sess., p. 24; S. Rept. No. 752, 79th Cong., 1st Sess., p. 14. The Commission's proceeding fully met this standard.

Petitioners' complaint is that the Notice of Inquiry and Notice of Proposed Rule Making adopted April 22, 1965 (30 F.R. 6078, 1 F.C.C. 2d 453) gave no hint (Br. 47) that the Commission was proposing a rule which would permit it to order a hearing on the impact of CATV in San Diego and to accompany the hearing order with an order maintaining the *status quo* on CATV development pending the outcome of the hearing. But this argument ignores the fact that one of the basic issues set forth (at considerable length) in the April 1965 Notice was the potentially harmful effect upon "free" local television, and particularly the effect upon independent (non-network) UHF stations, of "the mushrooming entry of CATV into major centers of population" (par. 39, 30 F.R. at 6083, 1 F.C.C. 2d at 468). The Commission extensively discussed the issues involved in CATV operation "in areas with potential for independent stations," pointing out that "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities" (par. 48, 30 F.R. at 6085, 1 F.C.C. 2d at 471).[34]

[34] San Diego has VHF Channels 8 and 10, and UHF Channels 15, 39 and 51 assigned to it by Section 73.606 of the Commission's Rules, 47 CFR 73.606. Channel 15 is reserved for non-commercial educational use.

The Commission requested comments not only on the general problem, but also on the specific proposals of certain petitioners for rule making, whose proposals were set forth in the Notice. These proposals included a request that the Commission "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the station's signals to serve other areas except upon prior consent of the Commission * * *" (par. 10, 30 F.R. at 6079, 1 F.C.C. 2d at 457); a request to "stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect," for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas," (par. 22, 30 F.R. at 6081, 1 F.C.C. 2d at 462); and a request that the Commission "put on notice persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and *that some CATV systems may be required to modify or cut back their operations*" (par. 24, 30 F.R. at 6082, 1 F.C.C. 2d at 463). [Emphasis added.]

In the Notice, the Commission recognized that it lacked sufficient information to gauge the impact of CATV entry into the large markets (par. 45–48, 30 F.R. at 6084–6085, 1 F.C.C. 2d at 470–471), and asked for comments on the proposals already submitted

(par. 48) and counterproposals as to alternative measures (par. 64, 30 F.R. at 6086–6087, 1 F.C.C. 2d at 476). It stated (par. 64) that while it expected to conduct further rule making proceedings, "in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counter proposals as to alternative measures are also invited." It also "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." (Par. 65, 30 F.R. at 6087, 1 F.C.C. 2d at 477.)

In par. 67 of the Notice [35] (30 F.R. at 6087, 1 F.C.C. 2d at 477) the Commission requested early comments on two phases of the proceeding: (1) Part I of the rule making, dealing with the assumption of jurisdiction over non-microwave CATV systems and the application to them of the rules on carriage and nonduplication of local stations (par. 27–36, 30 F.R. at 6082–6083, 1 F.C.C. 2d at 463–467); and (2) par. 50 of Part II, which paragraph proposed interim action

[35] Par. 67 reads in full, "All interested persons are invited to file written comments on the rule amendments proposed in part I, and on par. 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rulemaking in part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice."

to deal with the problem of "proposed large-scale CATV operations in major cities with burgeoning UHF independent development" while the full proceeding was pending (30 F.R. at 6085, 1 F.C.C. 2d at 471–472). Comments on the remainder of Part II, dealing with the large-market and other questions (30 F.R. at 6083–6087, 1 F.C.C. 2d at 467–476), were to be submitted some two months later.

Paragraph 49 of the Notice had stated that while the rule making was underway, applications to use microwave radio to serve CATV systems in the larger communities would not be granted without "a full and clear showing" that independent UHF service would not be threatened. In par. 50 the Commission requested comments on interim action where a CATV in a large market did not use radio facilities. It stated (30 F.R. at 6085, 1 F.C.C. 2d at 472):

> Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to part I of the notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling show-

> ing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community). * * *

In sum, the Commission proposed new rules to regulate or limit CATV entry into the larger markets, and also specifically proposed early action to maintain the *status quo* until final rules were adopted. Voluminous comments were received on both the interim proposal and the final rules. Midwest Television, Inc., the licensee of station KFMB–TV, on Channel 8 in San Diego, in commenting on the interim procedures,[36] asked for an immediate stay of CATV activity, with particular reference to San Diego, which it termed a "critical situation" of rapid CATV growth. It asked the Commission to take immediate "interim action to keep the situation from getting out of hand while it proceeds to consider final and comprehensive regulations to govern CATV," and urged that the interim rule be made applicable to existing systems, again with specific reference to San Diego.[37]

The Association of Maximum Service Telecasters, Inc., in its comments on Part I and par. 50 of Part II, filed July 26, 1965, also requested prompt interim controls on the expansion of CATV activity, including limitations upon existing systems, and further suggested summary procedures to handle requests for different treatment than that provided in the rules. It stated (par. 109):

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[36] Midwest also filed comments in Part II, to which Trans-Video Corp., filed a reply.

[37] Excerpts from the Midwest comments, filed July 26, 1965, are set forth in Appendix D hereto.

> The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.[38]

As AMST further pointed out in its comments (Appendix C hereto, p. 146), the Commisison had made a specific rule making proposal to this effect, including proposed special procedures for granting temporary relief pending evidentiary hearing, in a notice issued at an earlier stage in the proceedings prior to the First Report. Notice of Further Proposed Rule Making, FCC 63–1128, 28 F.R. 13789, 13791, 13792. While these proposed special procedures were not adopted in the Commission's First Report and Order, the Commission did "not terminate these proceedings by this First Report and Order," but "instead [held] them open for final action in conjunction with our action" on the concurrently issued rule making notice

[38] This general portion of these comments is set forth in Appendix E hereto. We note in this connection that AMST was urging in these particular comments only the adoption of a rule to prohibit the extension of a signal beyond its Grade B contour.

of April 22, 1965, discussed above. First Report and Order, 30 F.R. 6038, 6040, 38 F.C.C. 683, 687, Notice of Inquiry and Notice of Proposed Rule Making, 30 F.R. 6078, 6082, 1 F.C.C. 2d 453, 465.

In its comments on Part II, filed September 27, 1965, AMST again urged a rule limiting CATVs from extending the signals of television stations beyond their Grade B contour, and went on to state (par. 76, 77) that provision should be made for a special showing by a television station that a CATV system should not carry stations whose Grade B contours reach the community.[39]

[39] "Just as provision should be made for a special showing that an exception to the proposed rule is warranted, so, too, provision should be made for a special showing by an affected television station that the circumstances are such that a CATV system should be precluded from carrying stations whose Grade B contours encompass the community in question. For example, the community could be close to several stations which provide off-the-air service and be separated by a ridge of mountains from the outside stations even though theoretically their Grade B contours encompass the community. Or, for example, the community in question could be receiving marginal Grade B service from stations located in a distant city and be part of the metropolitan area of or otherwise closely located and tied to another city in which television stations are located. In such situations and other situations where the importation of the outside signal by CATV could be shown to significantly change an existing pattern of local and area television service, provision should exist for special relief.

Accordingly, the Commission should, by rule, provide for summary, non-hearing procedures to handle claims for exceptions to any particular provision of the distant station rule and to handle requests for other or different treatment than is provided for in the rule. Such procedure would allow a CATV proponent or affected station to seek an exception or other special relief upon a showing of circumstances or conditions justifying such treatment. There should be adequate notice to

In sum, the Notice was in complete compliance with the notice requirements of the Administrative Procedure Act. The issues propounded in the Notice were how to deal with the growth of CATV in the large markets, and how to maintain the *status quo* until the broader policy decisions could be reached. These were the same issues resolved in the rules. And it can make no difference that the Commission determined to resolve the basic issue through individual, adjudicatory hearings rather than through further rule making, or that it utilized a "final" rule to maintain the *status quo*[40] pending the hearings instead of an "interim" rule. Further, AMST filed a proposal for a rule to provide for exactly the relief

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interested parties but the procedure should be summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time-consuming evidentiary hearings on these matters as a matter of course are not necessary to provide relief where relief would be appropriate."

[40] The Commission had contemplated adoption of a rule (set out in par. 50), designed to maintain the *status quo* until a further substantive rule (in Part II) could be fashioned delineating the expansion of CATV into areas where new UHF development of an independent (non-network) nature was or would be commencing. After examination of the comments, it concluded that it was not feasible, on the materials before it, to make the critical judgment as to impact of CATV on UHF development in these areas, and therefore determined upon a policy of holding adjudicatory hearings to obtain the critical facts. But it adopted the exact type of rule which it had proposed in par. 50, in order to maintain the *status quo* pending the outcome of these hearings. For clearly such a rule, whether labelled "interim" or "final" (and it would of necessity be a final rule in a legal sense), is necessary if the Commission were to be in a position to make the public interest

provided for, and granted, in this case, under Section 74.1109, 47 CFR 74.1109. Petitioners, who do not claim to have lacked knowledge of the proposals made by Midwest and AMST, had adequate opportunity to address themselves, as did the other parties, to the issues which the rules resolve.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Memorandum Opinion and Order of the Federal Communications Commission should be affirmed.

Respectfully submitted,

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judgment. Paragraph 3 of the Second Report and Order, 31 F.R. at 4540, 2 F.C.C. 2d at 726, in a sense is thus inaccurate in stating that only Part I and par. 50 of Part II were being dealt with, but correctly characterizes the essence of what was done.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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